

The University of Kentucky Office of Continuing Legal Education in 1996 originally published this article. Jeff Blair, KREC General Counsel, and John Ackman, Louisville attorney and former KREC General Counsel, authored it. The article has been updated to reflect changes in the law since 1996. It is copyrighted by the authors and may not be reproduced without the written permission of each.

Please note the following is intended to be informational and should not be considered legal advice. If you have specific questions, please contact the KREC or your private attorney.

As the law is subject to change, please research all relevant law prior to acting in reliance upon this article. This article is not intended to be exhaustive relative to KRS 324 or 201 KAR 11.

## **I. [5.1] Real Estate Brokers and Associates**

Kentucky requires real estate professionals to be licensed. This requirement “protects the public and promotes good business ethics.” Lockridge v. Hale, Ky. App. 764 S.W. 2d 84, (1989) (citing Ledford v. Faulkner, Ky., 661 S.W. 2d 475, (1983) and Sims v. Reeves, Ky., 261 S.W. 2d 812, (1953)). The Kentucky Real Estate Commission holds statutory authority to license and regulate real estate agents in Kentucky. KRS 324.281. The reader will note the following chapter cites primarily to regulations and statutes. Many statutory and regulatory licensee requirements have received no interpretations from Kentucky’s Appellate Courts.

## **II. [5.2] Real Estate Broker Defined**

KRS 324.010 defines a real estate broker as:

“any person who for a fee, commission, compensation or other valuable consideration sells or offers for sale, buys or offers to buy, deals in time shares and options, negotiates the purchase, sale or exchange of real estate, engages in property management, leases or offers to lease, rents or offers to rent, or refers or offers to refer for the purpose of securing prospects, any real estate or the improvements thereon for others”.

### **A. [5.3] Performance of Activity for “Others”**

KRS 324.010 defines a broker as one who performs the detailed activity “for others”. An individual may engage in personal real estate activity and not be acting as a broker. One example often seen involves “For sale by Owner” properties. No brokerage activity occurs when a person sells his or her own home without the assistance of a real estate agent. The activity involves selling of real estate but is not done “for others”. Please note, however, KRS 324.020(2), which states:

“A licensee who is an owner or builder-developer shall comply with the provisions of this chapter and the administrative regulations applying to real estate brokers and sales associates.”

Therefore, brokers or associates must comply with KRS 324 when dealing in their own property.

## **III. [5.4] Sales Associate Defined**

Any person affiliated with a Kentucky-licensed principal broker for performing acts or transactions encompassed by the definition of “broker” as defined in paragraph (a) of KRS 324.010 and licensed under Chapter 324 is a sales associate. KRS 324.010(f).

Associates or brokers who are acting as builder-developers must comply with all regulations and statutes applying to real estate brokers and associates. KRS 324.010(2). Note, however, that in order for a consumer to recover damages from the Real Estate Education, Research, and Recovery Fund (see section 5.30 *supra*) one must be acting in a licensee capacity as opposed to acting solely as a builder-developer. Leishman v. Goodlett, 608 S.W. 2d 377 (Ky. Ct. App. 1980).

#### **IV. [5.5] Office or Clerical Employees**

Office or clerical employees of a broker need no license as long as they:

- a. Are limited to duties normally attributed to such positions;
- b. Do not solicit or accept listings or offers;
- c. Do not show property;
- d. Do not negotiate real estate transactions;
- e. Do not disclose information available only to broker and not to general public; and
- f. Do not hold themselves out as engaged in business of brokering real estate.

201 KAR 11:011 (Section 2).

#### **V. [5.6] Exceptions to Licensing Requirements**

Certain exceptions exist to the licensing KRS 324.020 licensing requirement. These exceptions are discussed in the following sections.

##### **A. [5.7] Property Management**

KRS 324.020 does not apply to a person who as an owner or lessor performs any of the acts defined in KRS 324.010 with reference to property owned or leased by him or to his regular employees, with respect to the property so owned or leased, if the acts are performed in the regular course of, or as an incident to the management of the property and the investment in it. KRS 324.030(1). “Property Management” means the marketing, leasing, or overall management of real property for others for a fee, commission, compensation, or other valuable consideration. KRS 324.010(9).

##### **B. [5.8] Attorney At Law and In Fact**

Attorneys performing duties as an attorney at law and persons acting as an attorney in fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing or exchange of real estate are not required to hold a license. KRS 324.030(3)(4).

C. [5.9] Specific Legal Positions

Under KRS 324.030(4) any receiver, trustee in bankruptcy, administrator, or executor, persons selling real estate under order of any court or a trustee acting under a trust agreement, deed of trust, or will or the regular salaried employees thereof are excepted from the licensing requirements of KRS 324.020(1).

D. [5.10] Property Management Employees

A person engaged in property management if the person is either a regular employee of the owner or principal broker of the company engaged in property management or receives as his primary compensation the use of a rental unit is exempted from the license requirements of Chapter 324 (KRS 324.030(5)).

**VI. [5.11] Kentucky Real Estate Commission**

KRS 324.281 establishes the Kentucky Real Estate Commission. The Commission consists of five (5) persons appointed by the Governor, four (4) of who must come from the real estate profession. One (1) member must come from outside the real estate industry.

The Commission regulates real estate professionals. An individual must hold a license issued by the Real Estate Commission to act as a broker or sales associate. KRS 324.020(2).

A single act for a fee, commission, compensation or other valuable consideration of buying or selling real estate of or for another; offering for another to buy sell or exchange real estate, leasing, renting, or offering to rent real estate for the purpose of securing prospects; or dealing in options or time sharing shall constitute the person performing offering or attempting to act as a broker or sales associate. KRS 324.010(1). Please note the “single act” language indicating that one activity requires licensure.

A. [5.12] Commission Duties

The Commission’s statutory duties include drafting administrative regulations, holding disciplinary hearings concerning licenses; conducting examinations for license applications; conducting continuing education seminars for licensees; investigating irregularities or violations of KRS 324 and others. See KRS 324.281(5).

B. [5.13] License Requirements

1. [5.14] Associate

Applicants must complete six (6) academic credit hours or the equivalent in an accredited or approved real estate school. Each applicant must pass a written examination administered by the Commission or its representative. Only persons competent and trustworthy to transact the business of a broker or associate may receive real estate licenses. Applicants must be at least eighteen (18) years old and have a high school diploma or its equivalent. KRS 324.040(3).

2. [5.15] Broker

Brokers must complete twenty-one (21) academic credit hours or the equivalent with a minimum twelve (12) hours in real estate courses from an accredited or approved real estate school. Broker applicants must average at least twenty (20) hours per week as a sales associate for twenty-four (24) months prior to application. The Commission may substitute an applicant's associate degree in real estate or a baccalaureate degree with a major or minor in real estate to reduce the broker applicant's experience requirements from two (2) years to one (1). KRS 324.046(1), (4). Broker applicants should consult the Commission to determine current education requirements.

C. [5.16] Disciplinary Hearings

The Commission, pursuant to the authority of KRS 324.281(5), KRS 324.170(1), and KRS 324.160, may hold hearings on complaints against licensees. The hearings are held pursuant to the provisions of KRS Chapter 13B.

The Commission presently utilizes Hearing Officers to conduct most Commission hearings. Hearing Officers make recommendations to the Commission which the Commission may reject in whole, adopt in whole, reject in part and adopt in part, or return the matter to the Hearing Officer for further consideration. The Commission's findings are binding on an appellate court if supported by substantial evidence. Helm v. Warner, Ky. App., 597 S.W. 2d. 159 (1980). Complaints must allege a violation of the licensing laws to state a valid claim. 201 KAR 11.190 details the rules of practice and procedure for hearings before the Kentucky Real Estate Commission.

All motions must be submitted to the Commission in writing. Discovery through depositions, interrogatories or requests for admissions is allowed. Oral depositions must occur where the witness resides or does business. All discovery must be filed with the Commission at the cost of the requesting party. The Commission Chair or Hearing Officers assigned to a case may limit discovery.

D. [5.17] Grounds For Commission Discipline under KRS 324.160

KRS 324.160(4) details the grounds for which the Commission may take action against a licensee. The Commission is authorized to suspend or revoke any license, levy fines up to \$1,000, place a licensee on probation for up to twelve (12) months, require successful completion of academic credit hours, issue a formal reprimand or informal reprimand, as a condition of continued licensure, for any of the following causes:

1. Obtaining a license through false or fraudulent means.
2. Making any substantial misrepresentation, representation or failure to disclose known defects which substantially affect the value of the property. This area represents one of the most common source of complaints before the Commission.
3. Making any false promises of a character likely to influence, persuade or induce. See Givan v. Ask Realty, Ky. App., 788 S.W. 2d 503 (1990), "When a broker acts as an intermediary between a seller and a prospective buyer, a broker is under a duty to deal fairly and honestly with both parties, even in the absence of a principal/agent relationship with them."
4. Pursuing a continued and flagrant course of misrepresentation or making false promises through agents or advertising or otherwise.

5. Acting for more than one (1) party in a transaction without the knowledge of all parties for whom the licensee acts:
  - i. A real estate licensee shall not directly or indirectly buy property listed with him or listed with the licensee's principal broker nor acquire an interest therein without first indicating in writing on the offer to purchase his or her status as a licensee; and
  - ii. Before a real estate licensee becomes a party to a contract to purchase real property, the licensee shall disclose his or her status as a licensee to all parties, in writing, on the sales contract or on the offer to purchase.
6. Accepting valuable consideration for the performance of any of the acts specified in KRS Chapter 324, from any person, except from his principal broker in accordance with the compensation agreement between them. This prevents associates from receiving compensation directly from the buyer or seller. Such provisions stand for the proposition that the broker earns each commission rather than the associate. When acting as an agent in the management of a property, a real estate licensee shall not accept any commission, rebate, or profit and expenditure made for a client without the full knowledge and consent of the client.
7. Representing or attempting to represent a broker other than a principal broker without the express knowledge and consent of that principal broker.
8. Failing to account for or remit, within a reasonable time, any money belonging to others that comes into his possession. When acting as a property manager, the licensee shall render an accounting and remit all monies to his client strictly in accordance with the contract of employment.
9. Paying valuable considerations to any person for services performed in violation of KRS Chapter 324.
10. Entering a plea of guilty or an "Alford" plea to, or having been found guilty of, or having been convicted of, a felony, or a misdemeanor involving sexual misconduct, and the time for appeal has lapsed or the judgment or conviction has been affirmed on appeal, irrespective of an order granting probation following the conviction, suspending the imposition of sentence.
11. Soliciting, selling, or offering for sale real property under a scheme or program that constitutes a lottery, contest, or deceptive practice.
12. Offering prizes for the purposes of influencing a purchase or prospective purchase of real estate. "Prizes" means anything of value offered to a prospective purchaser on a condition set forth in the offer to the prospective purchaser. 201 KAR 11:011. Specifically excluded from this prohibition are:
  - i. Complimentary refreshments offered to the public; and

- ii. Giving a complimentary gift valued below fifty dollars at or after the closing where purchase of real estate is consummated and where the gift was not offered at any time prior to closing. 201 KAR 11:011.
- 13. Acting in the dual capacity of broker and undisclosed principal in the transaction.
- 14. Guaranteeing, authorizing or permitting a person to guarantee that future profits shall result from a resale of real property.
- 15. Negotiating or attempting to negotiate the sale, exchange, lease or rental of real property with an owner or lessor knowing that the owner/lessor has a written outstanding contract granting exclusive agency in connection with the property to another real estate broker.
- 16. Publishing or circulating an unjustified or unwarranted threat of legal proceedings or other actions.
- 17. Failure or refusing on demand to furnish copies of a document pertaining to a transaction dealing with real estate to a person whose signature is affixed to the document.
- 18. Failing, within a reasonable time, to provide information requested by the Commission as a result of a formal or informal complaint to the Commission which may indicate a violation of KRS Chapter 324.
- 19. Paying valuable consideration to any person for the name of potential sellers or buyers, except as provided in KRS 324.020(3).
- 20. Violating any of the provisions in KRS Chapter 324 or any lawful order, rule of administrative regulation made or issued under the provisions of Chapter 324.
- 21. Any other conduct that constitutes improper, fraudulent or dishonest dealings.
- 22. Gross negligence. (*See Allard v. Kentucky Real Estate Commission*, Ky., 824 S.W.2d 884 (1992)).
- 23. Conduct constituting an act of discrimination, regarding a person's race, color, creed, sex, or national origin. Use of scare tactics or blockbusting shall be considered improper conduct.
- 24. Obtaining, negotiating, or attempting to negotiate "net listings".

E. [5.18] Improper Conduct by Licensed Agent

201 KAR 11:121 details improper conduct for a licensed agent. Conduct by a licensed agent deemed improper includes:

- 1. To accept or agree to accept, without written disclosure to the seller or buyer, a referral fee from any person in return for directing a client or customer to such person, or another, who provides or agrees to provide

any goods, service, insurance or financing related to a transaction involving real estate. This provision shall not affect paying or receiving of referral fees between licensed agents for brokerage services.

2. To offer, either through advertising, direct contact or by others, to the general public, any prize, money, free gift, rebate or any other thing of value, as an inducement. It shall not be improper conduct to disseminate information about the fee or other compensation the licensed agent agrees to charge for his services or about inducements offered by the licensed agent's client.
3. To refuse or prohibit any prospective purchaser from viewing or inspecting real estate, listed for sale or lease, with the agent, or with the agent's company, without the written and signed direction of the owner.
4. To fail to act in accordance with a fiduciary standard toward his client.
5. To advertise a guaranteed sales plan without disclosure of whether a fee is charged for participation, whether the real estate must meet qualifications for participation, whether the purchase price under a guarantee of purchase of the owner's real estate will be determined by the licensee or a third party and whether the owner of the real estate must purchase other real estate listed for sale by the licensee or his designee.

A "guaranteed sales plan" means an offer or solicitation to guarantee the sale of an owner's real estate or to guarantee the purchase of the owner's real estate if the owner's real estate is not sold by the licensee. 201 KAR 11:121, 5(b).

"Required disclosure" is defined in 201 KAR 11:121 under the following parameters:

- i) Print Advertising - the disclosure shall be in letters at least 25% the size of the largest in the advertisement.
  - ii) Radio Advertising - the disclosure shall be verbal and clearly understandable.
  - iii) Television Advertising - the disclosure shall be verbal and clearly understandable or be written appearing on the screen at least three (3) seconds for the first line of lettering and one (1) second for each additional line of lettering and in letters which are eighteen (18) video scale lines in size or letters which are upper case or which are twenty-four (24) video scan lines in size for upper case capitals and lower case letters.
6. To violate any statute or administrative regulation governing brokers, sales associates, or real estate transactions.

F. [5.19] Additional Broker Duties and Liabilities

A broker carries more responsibilities and potential liability than does an associate. KRS 324.160(6) permits the Commission to fine, suspend, or revoke the license of the principal broker or a

managing broker, if the broker fails to exercise adequate supervision over the activities of licensed affiliates. The broker may also be held liable for the actions of an associate if the broker has knowledge of an associate's unlawful activity.

## **VII. [5.20] Escrow Accounts**

### **A. [5.21] Generally**

All principal brokers must have an escrow account in which all contract deposits and other's money must be deposited without reasonable delay. Unreasonable delay is defined at 201 KAR 11:011 as within two (2) working days of the creation of an executory contract. These accounts must be maintained in Kentucky and identified to the Commission in writing.

Escrow accounts may bear interest. The interest accrues to the person agreed to in writing by all parties. Checks cannot be drawn against uncollected deposits in the escrow account.

### **B. [5.22] Escrow Withdrawal Requirements**

Escrow withdrawal activity frequently produces licensee questions and consumer complaints to the Commission. If the contract does not provide for specific release, contract deposits cannot be withdrawn until:

- a. The contract has been terminated by performance; or
- b. By agreement in writing between the parties; or
- c. By an order of a court of competent jurisdiction.

KRS 324.111(4).

If none of the above events occur, an agent may release the contract deposit after being informed that one (1) of the parties intends not to perform under the contract. The release of the escrow deposit shall be made as provided in the contract. If no contractual provision is provided for, the broker may initiate the release process by notifying all parties at their last known address by certified mail that the contract deposit shall be distributed to the parties specified in the letter if the parties fail to perform, enter into written mutual release, or initiate litigation within sixty (60) days of the mailing date of the certified letter. If neither buyer nor seller initiates litigation or enters a written release within sixty (60) days of the mailing date of the certified letter, the broker may release deposit without penalty under KRS 324.111 and without civil liability.

## **VIII. [5.23] Advertising**

The Commission regulates real estate advertising. Many Commission consumer and licensee inquiries involve advertising. Real estate advertising may not be intentionally false, misleading or deceptive. KRS 324.117. The Commission construes what constitutes false, misleading or deceptive advertising through the use of applicable administrative regulations.

Inducements offered by agents to influence buyers or sellers are prohibited. 201 KAR 11:121. A seller, however, may offer a buyer inducements. An example best illustrates the distinction.



Seller A employs Agent B as her agent. Buyer C expresses an interest in buying Seller A's property. Seller A can offer Buyer C a \$500 savings bond if Buyer C purchases Seller A's home. However, Agent B cannot offer either Buyer C anything of value to buy the property nor Seller A anything of value to list the property with Agent B.

Agents are specifically allowed to disseminate information regarding inducements offered by the licensed agent's client. See KAR 11:121(2).

Other advertising prohibitions regarding guaranteed sales plans are discussed in Section [5.18] *supra*.

## **IX. [5.24] Reciprocal Licenses**

KRS 324.141 allows the Commission to enter into reciprocal licensing agreements with other states or territories. Kentucky grants reciprocity to states which require licensing and educational standards for minimal competence as a real estate licensee. As of July 1996, Kentucky holds reciprocity agreements with fourteen (14) states: Alabama, Florida, Georgia, Indiana, Iowa, Missouri, Nebraska, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Virginia and West Virginia.

Licensees interested in another state license through reciprocity should contact the Commission to receive the address of the other state's licensing authority. Reciprocal states require a certification of licensure from the Kentucky Commission stating the license is in good standing. The Commission charges a \$10 fee for this certification.

## **X. [5.25] Revocation**

The Commission may revoke an agent's real estate license under KRS 324.160. Commission revocation prohibits issuance of a new license for five (5) years. Individuals seeking issuance of another license post-revocation do so solely at the discretion of the Commission and shall retake the appropriate examination and meet all of the contemporary licensing requirements. KRS 324.220.

Revocation of a principal broker's license suspends the licenses of all licensees associated with the broker. KRS 324.230. Individuals suspended due to broker revocation must change principal brokers and be issued a new license. KRS 324.230.

## **XI. [5.26] Seller's Disclosure of Property Conditions**

Residential real estate sales and purchases involving licensees require seller completion and licensee delivery to buyer of a seller disclosure of condition form. Three (3) exceptions to this requirement exist:

1. Residential purchases of new homes if a written warranty is offered;
2. Sale of real estate at auction; and

### 3. Court supervised foreclosures. KRS 324.360.

Generally, the individual selling the property completes the Disclosure of Property Condition Form. Generally, the real estate licensee does not participate in the completion of this form. The Seller must complete and sign the disclosure form at one of two times; within seventy-two hours of the time of listing for sale or, for property not listed for sale, within five (5) business days of any executory contract for sale of the residential real estate. KRS 324.360(4).

The licensee must deliver an accurate copy of the completed property disclosure form to any prospective purchaser or prospective purchaser's representative upon request and to any prospective purchaser making a signed written offer to purchase without unreasonable delay. Delivery of the form is the responsibility of the broker or sales associate who anticipates being compensated in the real estate transaction. A compensated licensee must also retain an accurate copy of the completed form. See KRS 324.360 (4).

If a seller will not complete and sign the form, his or her refusal shall be communicated in writing by the broker or sales associate to the purchaser or prospective purchaser without unreasonable delay. KRS 324.360(6).

The Commission promulgated 201 KAR 11:350 as the present Seller Disclosure of Property Conditions Form. This form remains subject to amendment. As such, the practitioner should research current regulations promulgated in this area.

## **XII. [5.27] Escrow Of License**

An actively licensed broker or sales associate may place a license in escrow status by notifying the Commission in writing.

An escrowed licensee may not broker real estate (i.e., cannot broker real estate for consideration). They can, however, charge or receive a commission for a transaction engaged in before the license was escrowed.

An escrowed licensee is not required to comply with mandatory continuing education requirements. However, when activating an escrowed license, the current year's continuing education credits must be obtained in advance.

Finally, an escrowed licensee must pay all statutory fees each year, but does not need to pay the premium for errors and omissions insurance.

## **XIII. [5.28] Agency Disclosure Forms**

All licensees must disclose their agency status and parties represented.

This requirement does not apply to auction sales, property management, or commercial transactions.

All agents must deliver a consumer bulletin to a party at first contact. This bulletin explains various agency relationships. An Agency Disclosure Form must be executed and delivered before an offer is submitted or a contract is executed. This disclosure indicates whom the licensees are representing.

The possible licensee relationships are:

1. Representing the seller/listing agent and his company's agents,
2. Representing the buyer (through a buyer brokerage agreement in writing or orally),
3. Representing both parties (limited-dual agent);
4. Designated agency wherein separate licensees from the same company represent separate parties and the principal broker serves as dual agent for both parties (see KRS 324.121);
4. Representing neither party (also known as transaction broker).

#### **XIV. [5.29] Errors and Omissions Insurance**

All actively licensed agents must maintain errors and omissions insurance. This insurance covers damages from claims arising out of negligence (not fraud or intentional acts) while the licensee is engaged in brokering real estate. KRS 324.395.

#### **XV. [5.30] Recovery Fund**

The Recovery Fund, paid for by license fees, pays damages arising from violations of KRS Chapter 324 and intentional fraud resulting in damages to consumers. KRS 324.400.

If a licensee, acting in the capacity of a licensee, has been duly found guilty of fraud in the violation of one (1) or more of the provisions of KRS 324.160, and upon the conclusion of a final order entered by the Commission, or by the courts, if appealed, the Commission may pay to the aggrieved person(s) an amount not to exceed twenty thousand dollars (\$20,000) against any one (1) licensee, if the licensee has refused to pay the claim within a period of twenty (20) days of entry of a final order and if the amount or amounts of money in question are certain and liquidated. The Recovery Fund's liability for acts of any one licensee is capped at \$50,000 cumulatively. (KRS 324.410(1)).

No aggrieved party shall be entitled to recover compensation from the Real Estate Education, Research, and Recovery Fund unless the action against the licensee is commenced within two (2) years from actual knowledge of the cause of action or from such time as circumstances should reasonably have put the aggrieved party on notice of such cause of action.

#### **XVI. [5.31] Criminal Penalties**

In addition to the penalties set out in KRS Chapter 324, a Circuit Court may impose an additional penalty on any person who violates any provision of Chapter 324 by fining them not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or imprisoning them for a term not to exceed six (6) months, or both. Upon conviction, there shall be added to the fine the amount of any real estate brokerage commission paid or received as a result of the violation(s) in question. Each transaction shall be regarded as a separate offense and shall be punished as such.

## **XVII. [5.32] Other Regulatory Requirements**

Four (4) regulations are of further note to the real estate practitioner. They are set forth below:

1. 201 KAR 11:040: all contracts prepared by agents must contain a provision setting forth how the sale will be financed.
2. 201 KAR 11:045: all written offers must be submitted to the client or customer without unreasonable delay.
3. 201 KAR 11:062: the principal broker shall maintain all records relating to real estate transactions for four (4) years following consummation in a single file.
5. 201 KAR 11:250: listing and purchase contracts - required provisions.

Listing contracts shall include:

1. Listing price of the property unless sale is by auction;
2. Date of the signing of the listing contract for all parties who sign;
3. Date and time of expiration of listing contract;
4. Fee or commission agreed upon;
5. Street, address or location of the real estate listed for sale;
6. Signatures of all owners; and
7. Special directions of the owner concerning limitations on showings and subagency restrictions.

An offer to purchase and a counter offer prepared by or at the direction of a licensed agent shall include the:

1. Purchase price, amount of contract deposit given and who is to hold the deposit;
2. Date and time of signing of the offer or counter offer for all parties whom sign;
3. Date and time when offer or counter offer expires;
4. Street, address or a general description of the real estate sufficient to identify the parcel;
5. Names of the offering party and the agent who prepared the offer or counter offer; and
6. Provision setting forth the date by which the closings shall occur and when possession shall be given the buyer.

A licensed agent shall insert the following provision in a contract made after an executory contract of sale of real estate that has not lapsed according to its terms:

“This contract is contingent upon the non-performance of a contract of sale, and any signed extension, in which [insert names of purchasers] have agreed to purchase the real estate that is the subject of this contract.”